United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL MEMORANDUM

NO. 77-7228

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Docket No. 77-7228

CALLMAN GOTTESMAN and PAUL J. PEYSER,
Plaintiffs-Appellants

--against--

GENERAL MOTORS CORPORATION and
E.I. DU PONT DE NEMOURS & COMPANY,
Defendants-Appellees.

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

APPELLANTS' SUPPLEMENTAL MEMORANDUM

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APPELLANTS' SUPPLEMENTAL MEMORANDUM

This memorandum is prompted by the decision of this Court, rendered last week, in Lasker v. Burks (77-7060), discussed on the first page of the New York Law Journal on January 12, 1978.

This authority focuses attention upon the fact that when impropriety or breach of fiduciary obligation to a large extent is charged in connection with the activities of a corporation or its directors, the corporations involved in the exercise of "business judgment" by its directors seek to avoid any appearance of a "white-wash" or "cover-up".

Accordingly, the corporations see to it that a completely independent group assisted by a separate and independent counsel of high caliber and standing makes a thorough and impartial investigation of the charges and submits a Report so that the corporation may determine what legal action, if any, it wishes taken -- by wholly independent counsel -- to recover claimed losses or damages.

The fact of the independent investigations and reports are not concealed but are made known to the corporate stockholders -- whose interests are to be protected -- and the expenses

of such investigation and report are borne by the corporation.

This practice prevalent under the laws of Delaware and New York is illustrated in the following cases where counsel of the highest caliber* were designated to conduct the investigations.

> Lasker v. Burks, 404 F. Supp. 1172 (SDNY 1975, Werker, J.); 426 F. Supp. 844; revd CA 2, January 11, 1978, Docket #77-7060 and see footnote 14, p. 1000;
>
> Gall v. Exxon Corp., 418 F. Supp. 508 (SDNY 1976 Carter J.), complaint thereafter dismissed after discovery on January 17, 1977, 75 Civ. 3682;
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> Auerbach v. Bennett, Sup. Court, Westchester, Rubin, J., NYLJ, May 10, 1977, p. 14;
>
> Auerbach v. Aldrich, Sup. Court, Westchester, Sirignano, J., NYLJ, December 23, 1977, p. 13.

After the Supreme Court reversal, General Motors had far greater reason to have the independent investigation conducted than the corporation in the above cases.

As Judge Metzner pointed out (430 F. Supp. at 1044), the damages recoverable by General Motors in Gottesman could have been "astronomical, overshadowing any recovery ever received in any litigation in the history of this country. This could well have justified the expenditure of $345,059.95 (by plaintiffs) for disbursements."

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* The independent counsel in these cases were respectively, Hon. Stanley H. Fuld, former Chief Judge of the New York Court of Appeals, Hon. Joseph Weintraub, former Chief Justice of the New Jersey Supreme Court, Hon. Charles S. Desmond, also a former Chief Judge of the New York Court of Appeals, and Hon. Arthur D. Brennan, former Associate Justice, New York Appellate Division, Second Department.

The damages claimed in the above cases were far less and covered a much shorter period than Gottesman.

Further, the above cases did not follow, as Gottesman, a clear cut decision by the Supreme Court adjudicating that the actions on the part of the controlling stockholder in its dealings with General Motors, over a period of several decades, were illegal and violated the anti-trust laws.

Yet the Record is clear that after the Supreme Court reversal, General Motors has never claimed that, either before or even after divestiture, it sought to have an independent investigation * conducted by outside independent counsel of high caliber to determine impartially whether du Pont's adjudicated illegal actions had damaged General Motors -- a matter which this Court recognized (436 F2nd at 1209) had not at all been passed upon in the Government case (See Main Brief pp 24, 25; Reply Brief pp 4-6). Instead, General Motors admits (A 99a) that instead of having such investigation made, it was "the original management decision not to sue du Pont" and it consistently adhered to that decision thereafter.

We have pointed out (Main Brief p. 25; Reply Brief p. 6) that Judge Le Buy in determining what relief should be granted after

*Such an investigation and report is all the more required in Gottesman where a derivative suit was mandated irrespective of the position taken by the directors.

the first Supreme Court reversal, appointed as amici curiae, attorneys "who were among the leading members of the Illinois Bar" (177 F. Supp 6) separately to represent and protect the independent interests of the general stockholders of General Motors and du Pont's general stockholders and directed them, after conducting their own investigations, to submit their individual reports to the Court. No such protection to the interests of its general stockholders was afforded by General Motors in making a determination whether there existed any claim for damages against du Pont or whether to enforce such a claim by action or otherwise, or even what position it should properly take as a defendant in Gottesman.

Not only did General Motors fail to have this independent investigation conducted as to damages, but from the very beginning of Gottesman, it consistently joined with du Pont in trying to prevent any airing of the question and when this Court rejected its motion to dismiss, thereafter joined with du Pont at every step in order to defeat or minimize recovery.

After some twenty years of vigorously contested litigation -- without the cooperation of General Motors at any stage -- Gottesman finally secured a compulsory accounting by du Pont.

The amount of legal services and disbursements required to secure such compulsory accounting was enormously increased by the obdurate opposition of General Motors.

It is respectfully submitted, as we have pointed out in our prior briefs, that plaintiffs' expenses and counsel fees, required to secure the compulsory accounting by du Pont should be borne by General Motors as well as du Pont.

Respectfully submitted,

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Dated: January 18, 1978